PD-1211-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 7/1/2021 4:16 PM
Accepted 7/7/2021 1:14 PM
DEANA WILLIAMSON
CLERK

No. PD-1211-20
IN THE COURT OF CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
7/7/2021
DEANA WILLIAMSON, CLERK

ON REVIEW FROM THE COURT OF APPEALS FOR
THE NINTH DISTRICT OF TEXAS AT BEAUMONT
No. 09-19-00097-CR

NATHANIEL ALLEN JOHNSON, *Appellant,*

v.

THE STATE OF TEXAS, *Appellee.*

Arising from **Cause No. 18-10-14374**
IN THE DISTRICT COURT FOR THE
9TH JUDICIAL DISTRICT, MONTGOMERY COUNTY, TEXAS

STATE'S BRIEF ON DISCRETIONARY REVIEW

BRETT W. LIGON
District Attorney
Montgomery County, Texas

ECHO HUTSON
Assistant District Attorney
Montgomery County, Texas

PHILIP S. HARRIS
Assistant District Attorney
Montgomery County, Texas
T.B.C. No. 24086583
207 W. Phillips, Second Floor
Conroe, Texas 77301
936-539-7800
936-760-6940 (Fax)
philip.harris@mctx.org

IDENTITY OF PARTIES AND COUNSEL

District Attorney:	**BRETT W. LIGON** District Attorney Montgomery County, Texas
Counsel for the State in the trial court:	**ECHO HUTSON** Assistant District Attorney Montgomery County, Texas **RAPHAEL ORTEGA** Former Asst. District Attorney
Counsel for the State in the appellate courts:	**PHILIP S. HARRIS** Assistant District Attorney Montgomery County, Texas 207 W. Phillips, Second Floor Conroe, Texas 77301
Appellant:	**NATHANIEL ALLAN JOHNSON**
Counsel for the appellant in the trial and appellate courts:	**JON A. JAWORSKI** Attorney at Law 1313 Campbell Road, Suite E Houston, Texas 77055

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE

The appellant was charged by indictment with assault against a family member by occlusion, enhanced to a second-degree felony by a prior conviction for assault against a family member (C.R. 6). The indictment further listed two prior felony convictions for punishment enhancement purposes (C.R. 6). The appellant pleaded not guilty, but a jury found him guilty as charged (C.R. 187). After hearing additional evidence—including the appellant's true pleas to the enhancement paragraphs—the jury assessed his sentence at imprisonment for life (C.R. 187).

The appellant gave notice of appeal, and the Court of Appeals for the Ninth District of Texas affirmed the trial court's judgment. *See Johnson v. State*, No. 09-1900097-CR, 2020 WL 6929375, at *9 (Tex. App.—Beaumont Nov. 25, 2020, pet. granted) (mem. op., not designated for publication). This Court then granted the appellant's petition for discretionary review only as to his first issue.

ISSUE PRESENTED

The Beaumont Court of Appeals erred in finding the evidence legally sufficient to prove Petitioner had a qualifying prior conviction for purposes of Texas Penal Code § 22.01(b)(2)(A). Consequently,

A. Petitioner was entitled to a directed verdict; and

B. Petitioner's objections to the section 22.01(b)(2)(A) jury charge were erroneously denied.[1]

STATEMENT OF FACTS

One night, R.S.[2] and the appellant—R.S.'s live-in boyfriend—began arguing. (2 R.R. 134–35). The appellant physically escalated the argument by pinning R.S.'s arm behind her back, getting on top of her, and pushing her head into a pillow to block her nose and mouth (2 R.R. 35–36).

This was not the first time the appellant physically assaulted a family member. In 2009, the appellant was living with his girlfriend, B.W., in El Dorado, Arkansas when he was arrested for assaulting B.W. (2 R.R. 282; 3 R.R. 109–11). The appellant

[1] Although the appellant asserts that he was charged for third-degree felony assault against a family member with a prior conviction for family violence assault under Penal Code § 22.01(b)(2)(A), he was indicted and convicted for assault by occlusion with a prior conviction for family violence assault, a second-degree felony under Tex. Penal Code Ann. § 22.01(b-3) (West Supp. 2020) (C.R. 6, 187).

[2] To protect the victim's privacy, this brief identifies her by using initials. *See* Tex. Const. art. I, § 30 (granting crime victims "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process").

pleaded guilty to "Battery 3rd Degree Domestic" and received a fine of $500 (5 R.R. 56–57).

SUMMARY OF THE STATE'S ARGUMENT

The State may enhance third-degree-felony assault by occlusion against a family member to a second-degree felony if the defendant has previously been convicted of an offense under Chapter 22 of the Texas Penal Code against a member of the defendant's family. The State must offer legally sufficient evidence that the prior conviction exists and that the defendant is linked to that conviction. The State need not prove the existence of a prior conviction in any particular manner—documentary or testimonial evidence may suffice. By introducing a docketing statement reflecting a conviction for a prior incident of assault against a family member and producing two witnesses involved in the appellant's arrest, the State sufficiently proved the existence of a conviction and linked the appellant to it.

Further, a conviction from another state with substantially similar elements qualifies as an offense under Chapter 22 for enhancement purposes. Here, because the trial court could take implicit judicial notice of the statute underlying the appellant's Arkansas conviction and conduct a substantial-similarity analysis, the court of appeals correctly held that sufficient evidence supported the appellant's prior conviction for assault against a family member.

But even if the State failed to prove that the appellant's prior family-violence conviction could enhance his offense, the appropriate remedy is judgment reformation, not acquittal.

ARGUMENT AND AUTHORITIES

I. The State proved that a prior conviction existed and linked the appellant to that conviction.

The appellant's indictment required the State to prove that the appellant:

(1) caused bodily injury to E.S.;

(2) by intentionally, knowingly, or recklessly impeding her normal breathing or blood circulation by applying pressure to her throat or neck or by blocking her nose or mouth; and

(3) had been previously convicted of an offense under Chapter 22, Chapter 19, or Section 20.03, 20.04, or 21.11 against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code.

(C.R. 6). *See* Penal Code § 22.01(b-3). The appellant contends that the trial court erroneously denied his motion for directed verdict and objection to the jury charge because the State failed to prove both the existence of the prior conviction, and that the prior conviction could be used for enhancement under Texas law.[3] The appellant's arguments lack merit.

[3] Appellate courts handle complaints about the denial of a motion for directed verdict as a challenge to the legal sufficiency of the evidence. *See Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996). And though the appellant also characterizes his argument as jury charge error, his complaint merely rephrases his

To prove a prior conviction, the State must prove beyond a reasonable doubt that the conviction exists and that the defendant is linked to it. *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007). Texas law does not require that a prior conviction be proven in any specific manner. *Id.* at 922. Though a certified copy of a judgment may be the "preferred" means to prove a prior conviction, "there is more than one way to skin a cat." *Id.* at 921–22.

In *Flowers*, the State proved the defendant's prior driving-while-intoxicated conviction using a certified copy of a computer printout from the Dallas County Clerk and the defendant's driver's license record. *Id.* at 925. This Court noted that the printout reflected a DWI conviction in Dallas County and identified the defendant by name, date of birth, social security number, and other personal descriptors. *Id.* This information, combined with matching information on the defendant's driving record, was sufficient to prove the defendant's prior conviction. *Id.*

Multiple courts of appeals have relied on this Court's reasoning in *Flowers* to find that the State proved a defendant's prior conviction despite lacking a certified copy of a judgment. *See, e.g., Culpepper v. State*, No. 12-18-00282-CR, 2019 WL 6358161, at *3 (Tex. App.—Tyler Nov. 27, 2019, pet. ref'd) (mem. op., not

---

complaint that the trial court erred in allowing the jury to consider an element that the State failed to prove.

designated for publication); *Lee v. State*, 582 S.W.3d 356, 364–66 (Tex. App.—San Antonio 2018, pet. ref'd); *Morgan v. State*, No. 05-16-00257-CR, 2017 WL 2871420, at *4–5 (Tex. App.—Dallas June 29, 2017, no pet.) (mem. op., not designated for publication); *Garcia v. State*, No. 01-15-00030-CR, 2016 WL 7011411, at *10 (Tex. App.—Houston [1st Dist.] Dec. 1, 2016, pet. ref'd) (mem. op., not designated for publication); *Brown v. State*, 508 S.W.3d 453, 456 (Tex. App.—Fort Worth 2015, pet. ref'd).

In *Brown*, the State offered documents[4] from Alabama to prove that the defendant had a final felony conviction for punishment-enhancement purposes. *See Brown*, 508 S.W.3d. at 457. The defendant argued that those documents were insufficient to prove the existence of a prior felony conviction as they did not comply with the Texas Code of Criminal Procedure's requirements for a judgment of conviction. *See id.* at 456. But the court of appeals noted that the documents, though not labeled a judgment and missing some information required by the Code of Criminal Procedure, still identified the case number, the appellant's name, a date of birth, a description of the charge, the date of indictment, the date of arrest, the defendant's entry of a guilty plea, the trial court's finding of guilt, a description of the defendant's punishment, and the last four digits of the defendant's social security

[4] The opinion in *Brown* does not identify the documents beyond explaining that they were not labeled as a judgment.

number. *See id.* at 457. The detailed information in the documents convinced the court that they sufficiently proved that the defendant was previously convicted of a felony. *Id.*

Here, the trial court admitted State's Exhibit 11, a certified copy of a docket sheet from the Union County District Court in Arkansas, reflecting that a Nathaniel Allen Johnson was charged with "Battery 3rd Degree Domestic" on May 27, 2009 (5 R.R. 56–57). The docket sheet further indicated the date of birth and social security number of the individual charged (5 R.R. 56–57). The docket sheet also stated that the charged individual pleaded and was found guilty on September 1, 2009, and was ordered to pay a $500 fine. The court also admitted State's Exhibit 13, Texas Department of Public Safety records that identified Nathaniel Allen Johnson as having the same date of birth and social security number as the Johnson on the Arkansas paperwork (5 R.R. 58).

Two witnesses further connected the appellant to the Arkansas conviction. Former El Dorado Police Department Lieutenant Randal Gilbert testified that he arrested the appellant for the offense reflected in State's Exhibit 11 (2 R.R. 277–78). Gilbert also testified that the social security number and date of birth on State's Exhibit 11 are the appellant's (2 R.R. 281–82). And B.W. testified that the appellant was arrested for assaulting her on May 27, 2009, while they were in a romantic relationship (3 R.R. 109–11). B.W. also identified the appellant in a photograph on

State's Exhibit 13 (3 R.R. 110). So the court of appeals correctly held that the State proved that a prior conviction existed and linked the appellant to that conviction.

II. The State established that the appellant's out-of-state conviction could enhance his charged offense.

In addition to proof that the appellant's prior conviction exists and that the appellant is linked to it, section 22.01(b-3)(2) requires that the prior conviction be for "an offense under Chapter 22, Chapter 19, or Section 20.03, 20.04, or 21.11 against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code." *See* Penal Code § 22.01(b-3)(2). The code allows for an out-of-state conviction to enhance an offense under section 22.01(b-3)(2) if that conviction is for an offense with "substantially similar" elements as one of the offenses listed. *See id.* § 22.01(f)(2).

A. The trial court may take judicial notice of statutes to determine whether a prior conviction can enhance a charged offense.

The appellant implies in his brief that the State was required to prove beyond a reasonable doubt to the jury that the appellant's Arkansas conviction was for an offense with substantially similar elements to one of the enumerated code provisions in section 22.01(b-3)(2). But case law suggests otherwise.

Courts of appeals that have addressed evidentiary sufficiency questions regarding the substantially similar elements framework of section 22.01—and comparable statutes—have uniformly held that the trial court, not the jury,

determines whether a defendant's prior conviction may legally enhance his conviction. Further, courts may take implicit judicial notice of the statutes needed to make that determination. In *Hill v. State*, 392 S.W.3d 850, 856–57 (Tex. App.—Amarillo 2013, pet. ref'd), for example, the defendant made a nearly identical argument to the appellant's: that the trial court should have directed a verdict of acquittal because the State failed to prove whether the elements of an Oklahoma statute were substantially similar to the elements of a family violence conviction in Texas. But the court of appeals held that the trial court could use the evidence in the record to identify and take judicial notice of the elements of the Oklahoma statute, including the name of the offense and its statute number, to find that the Oklahoma statute's elements were substantially similar to those in its Texas counterpart. *See id.* at 858.

And in *Hardy v. State*, 187 S.W.3d 232, 236 (Tex. App.—Texarkana 2006, pet. ref'd), the court of appeals similarly rejected the defendant's contention that the State was required to prove to the jury in the punishment phase of trial that the statute underlying his California conviction for "forcible rape" contained substantially similar elements to an offense listed in Penal Code section 12.42(c)(2)(B). *See* Tex. Penal Code Ann. § 12.42(c)(2)(B)(v) (West 2019). The *Hardy* court instead held that such a substantial similarity analysis is a question of law for the trial court to resolve, and that the trial court implicitly held that the California offense was

substantially similar to its Texas analogue by instructing the jury on the legal consequences of finding the California conviction true. *See Hardy*, 187 S.W.3d at 236.

In *Hardy* and *Hill* the State offered no evidence of the specific elements of the out-of-state offenses supporting the enhancing conviction, yet in both cases the court of appeals held that the trial court was authorized to take implicit judicial notice of those elements. *See Hill*, 392 S.W.3d at 858; *Hardy*, 187 S.W.3d at 236. Both courts further held that the trial courts' actions in submitting the enhancing conviction to the jury implied that the courts took judicial notice of the appropriate statutes and made a substantial similarity determination—even though the record did not contain that determination. *See Hill*, 392 S.W.3d at 858; *Hardy*, 187 S.W.3d at 236.

Giving the trial court—rather than the jury—the gate-keeping role over whether a prior conviction can legally enhance an offense makes sense. Whether two offenses have substantially similar elements is a legal question, which appellate courts routinely review *de novo*. *See, e.g., Hill,* 392 S.W.3d at 859; *Brooks v. State*, 357 S.W.3d 777, 786 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd); *Hardy*, 187 S.W.3d at 236. Indeed, instructing a jury on the two-prong for determining substantial similarity would be difficult and cumbersome. *See Prudholm v. State*, 333 S.W.3d 590, 594 (Tex. Crim. App. 2011).

And the concept of taking implicit judicial notice is not novel. Even here, the trial court took implicit judicial notice on its own motion without objection. Section 22.01(b-3)(2) requires two things: that the appellant's prior conviction be under Chapter 19, Chapter 22, Section 20.03, 20.04, or 22.11 of the Penal Code (or an out-of-state offense with substantially similar elements); and that the prior offense was committed "against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005 of the Texas Family Code." Penal Code § 22.01(b-3)(2). Here, the appellant has not disputed that the he and B.W. were in a relationship that falls under one of the enumerated Family Code sections, despite the State offering no evidence establishing the text of those statutes. All parties understood that the trial court could judicially notice the contents of those Family Code provisions on its own and determine whether B.W. and the appellant had a qualifying relationship. Similarly, the trial court could judicially notice the contents of the Arkansas statute and determine that it could legally enhance the appellant's offense. *See* Tex. R. Evid. 202 (permitting the trial court to take judicial notice on its own motion of another State's public statutes); *Hardy*, 187 S.W.3d at 236 (noting that a party may object and request an opportunity to be heard as to the propriety of a trial court taking judicial notice, even when the trial court's taking judicial notice is not in the record).

B. The trial court took implicit judicial notice of the elements of the Arkansas statute underlying the appellant's conviction.

Here, the State presented sufficient evidence to allow the trial court to make the required substantial similarity finding—a finding implicit in the trial court's overruling the appellant's motion for directed verdict and objection to the jury charge.[5] State's Exhibits 11 and 13 reflected that the defendant was convicted in Arkansas of an offense labeled "Battery 3rd Degree Domestic" (5 R.R. 56). Only one offense in the Arkansas Criminal Code matches that label, section 5-26-305, "Domestic battering--Third degree." *See* Ark. Code Ann. § 5-26-305(a) (West Supp. 2017). Thus, even though the State did not furnish the specific code citation to the trial court, the offense's title provided sufficient information to allow the court to take judicial notice of the elements of the offense and conduct a substantial similarity analysis. So the State sufficiently proved that the appellant's prior conviction could enhance his charged offense to a second-degree felony, and the trial court properly denied the appellant's motion for a directed verdict and overruled the appellant's objection to inclusion of the enhancing conviction in the court's charge.

So this Court should overrule the appellant's sole point on discretionary review and affirm the judgment of the court of appeals. But even if this Court holds

[5] In trial and on appeal, the appellant has challenged only the State's failure to introduce evidence to prove whether the Arkansas statute has substantially similar elements to its Texas counterpart. The appellant does not allege that the two statutes are not substantially similar.

that the State failed to prove the prior conviction, the appellant's requested relief is not appropriate.

III. The appropriate remedy for the State's alleged failure to prove the prior conviction is judgment reformation, not acquittal.

The appellant's prayer for relief seeks an acquittal. Ordinarily, the lack of sufficient evidence to support a conviction results in an appellate court acquitting the defendant. *See, e.g., Byrd v. State*, 336 S.W.3d 242, 258 (Tex. Crim. App. 2011). But if the State fails only to prove an aggravating element of an offense, while sufficiently proving the essential elements of a lesser-included offense beyond a reasonable doubt, an outright acquittal is unjust, and the proper remedy is reformation of the judgment to the lesser-included offense. *See Bowen v. State*, 374 S.W.3d 427, 432 (Tex. Crim. App. 2012); *see also Britain v. State*, 412 S.W.3d 518, 521 (Tex. Crim. App. 2013) ("It would be a similar situation if the State charged someone with felony DWI and presented legally sufficient evidence of the DWI conduct but not of the enhancing prior conviction. In such a situation it is easy to strike the aggravating element and reform the judgment to reflect the crime without the enhancement.").

Here, whether the State sufficiently proved the elements of third-degree felony assault by occlusion is not before this Court. So if this Court sustains the appellant's objection to the prior conviction, the proper remedy would be to reform the judgment to the third-degree felony.

Further, no new punishment hearing is required upon judgment reformation, as the appellant cannot show harm in the punishment phase from any error in charging the jury on second-degree-felony assault by occlusion with a prior conviction. Judgment reformation due to insufficient evidence to prove an aggravating element usually requires remand for a new punishment hearing. *See, e.g., Jordan v. State*, 256 S.W.3d 286, 293 (Tex. Crim. App. 2008). In *Jordan*, this Court held that because of the State's failure to prove one of two enhancing convictions, the defendant's punishment range should have been anywhere from fifteen years to life imprisonment, rather than twenty-five years to life. *See id.* at 292–93. Because this Court could only speculate how a lower floor on the defendant's punishment range would impact the jury's exercise of its "normative function" in assessing a sentence, this Court remanded for a new hearing. *See id.* at 293.

But *Jordan* is inapposite. Here, assuming the State failed to prove that the appellant's Arkansas conviction could legally enhance his offense from a third-degree felony to a second, the appellant has not explained why that conviction would not have been admissible in punishment. *See* Tex. Code Crim. Proc. Ann. art. 37.07 (West Supp. 2020) (prior criminal record of defendant admissible in punishment hearing). And because the State properly proved the appellant's prior felony convictions as alleged in the punishment enhancement paragraphs, the appellant's

punishment range would not have changed had he been convicted only of a third-degree felony. *See* Tex. Penal Code Ann. § 12.42(d) (West 2019). Either way, he was subject to punishment as a habitual felon. So unlike in *Jordan*, where this Court recognized the "pure speculation" in calculating how the jury would exercise its normative function in assessing a sentence under a different punishment range, no speculation is required to conclude that under the same punishment range, with the same facts, the appellant's jury would have assessed the same sentence.

CONCLUSION AND PRAYER

The State respectfully requests that this Court affirm the judgments of the court of appeals and the district court; or in the alternative, modify the judgment of the district court to reflect conviction for third-degree felony assault against a family member by occlusion.

BRETT W. LIGON
District Attorney
Montgomery County, Texas

/s/ Philip S. Harris
PHILIP S. HARRIS
T.B.C. No. 24086583
Assistant District Attorney
Montgomery County, Texas
207 W. Phillips, Second Floor
Conroe, Texas 77301
936-539-7800
936-788-8395 (Fax)
E-mail: philip.harris@mctx.org

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the requirements of Tex. R. App. P. 9.4 (i)(2)(B) because there are 3,300 words in this document, excluding the portions of the document excepted from the word count under Rule 9.4(i)(1), as calculated by the Microsoft Word computer program used to prepare it.

/s/ Philip S. Harris
PHILIP S. HARRIS
Assistant District Attorney
Montgomery County, Texas

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served electronically upon counsel for the appellant at jaaws@peoplepc.com and upon the office of the State Prosecuting Attorney on the date of the submission of the original to the Clerk of this Court.

/s/ Philip S. Harris
PHILIP S. HARRIS
Assistant District Attorney
Montgomery County, Texas

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Philip Harris
Bar No. 24086583
philip.harris@mctx.org
Envelope ID: 54993029
Status as of 7/7/2021 1:15 PM CST

Associated Case Party: Law Office of Jon A. Jaworski

Name	BarNumber	Email	TimestampSubmitted	Status
Jon A.Jaworski		jaaws@peoplepc.com	7/1/2021 4:16:20 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stacey Soule	24031632	information@spa.texas.gov	7/1/2021 4:16:20 PM	SENT